

K. (Donaldson & Co.) Bookseller

THE
PLEADINGS
OF THE
COUNSEL
BEFORE THE
HOUSE OF LORDS,
IN THE GREAT CAUSE CONCERNING
LITERARY PROPERTY;
TOGETHER WITH THE
OPINIONS OF THE LEARNED JUDGES,
ON THE
COMMON LAW COPY RIGHT OF AUTHORS AND BOOKSELLERS.
TO WHICH ARE ADDED, THE
SPEECHES OF THE NOBLE LORDS,
Who spoke for and against reverſing the DECREE of the
COURT of CHANCERY.

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IN THE CASE OF THE

LITERARY PROPERTY

TOGETHER WITH THE

OPINIONS OF THE CLARKE JUDGES

1844

AMONG LAW COPY RIGHT & AUTHORS AND BOOKSELLERS

BY JOHN W. FARRAR

NEW YORK: J. W. FARRAR

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P R E F A C E.

THE motive for printing these papers collected together, is, that such gentlemen of the law and others who are concerned in Literary Productions may see the substance of the Arguments and Opinions of those great men who distinguished themselves in the definition of so difficult a question as, What is called Literary Property? but particularly to preserve that elegant speech of the noble LORD CAMDEN, both with respect to law and equity.

The monopoly of books and copies has been for many years in the hands of a few persons who call themselves Book-sellers, about the number of *twenty-five*, to the entire exclusion of all others, but more especially the Printers, whom they have always held it a rule never to let become purchasers in Copies, even though themselves never paid any valuable consideration for them originally, and those for which they have, have been repaid them ten-fold within the times limited by authority of Parliament.

As it is impossible to set the matter in a clearer view than ~~his Lordship has~~, we must beg to refer the Reader to his Speech in the House on that occasion, by which may be discovered his

his great Knowledge of the Laws, and the intention of an *Honest Man* to do Justice to every person who has received a *real* injury.

The Bill now depending (if passed into a Law) will, it is hoped, in justice to those who have made recent purchases, allow them a sufficient time to indemnify themselves for the hazard and expence which must necessarily be given for the encouragement of Authors; but those Copies, by which so many Fortunes have been made in a long course of years, with respect to the number of editions, and the numbers printed of those editions, will be matter of enquiry worthy the attention of Parliament.

ARGUMENTS

A R G U M E N T S
USED BY COUNSEL IN THE
H O U S E O F L O R D S,
ON THE CAUSE OF
L I T E R A R Y P R O P E R T Y.

THIS great cause of Literary Property, which has so long engrossed the attention of all those concerned in the Republic of Letters, being now settled in the highest court of judicature in these kingdoms, it remains only for us to shew what arguments have been made use of to reverse a decree of Chancery in favour of the respondents; where will easily be discovered the difference between manly reasoning and sound law, in opposition to sophistical jargon and evasive argument.

The litigation took its rise from Messrs. Donaldsons' having printed (in Scotland) and published (in London) several of Thompson's works. Several other booksellers, claiming an exclusive property by purchase, filed their bill; had the matter decided in their favour in a Court of Common Law in England; lost it in Scotland, and gained it in the English Court of Chancery, from whence, by appeal, the

the Donaldsons brought it before the House of Lords, which began to be heard at their bar by counsel, on Friday February 4, 1774. The counsel were

For the Appellants

Mr. Thurlow, Attorney-General.
Sir John Dalrymple.

For the Respondents

Mr. Wedderburn, Solicitor-General.
Mr. Dunning, and
Mr. Hargrave.

FRIDAY, February 4.

The Attorney-General opened as counsel for the appellants, and spoke for two hours, endeavouring to prove the decree of the Court of Chancery, on the 16th of November, 1772, in favour of the respondents, an injury to the appellants, and that what was termed LITERARY PROPERTY, was not warranted or secured at common law. The Attorney-General in his speech used the same arguments, and went upon the same grounds which the counsel for Taylor, in his cause with Millar, in 1769, urged and maintained. He first entered into a minute investigation of the idea inculcated by what is called a publication; "which, he said, was not that mysterious thing the trade would make it; but simply a multiplication of copies; that whether they were multiplied to the number of five or five hundred, signified not an iota to the matter in dispute." He said, "that previous to the invention of printing, scribes, for copying an author's work, obtained a greater remuneration than persons who, since the invention of printing, diffuse writings by means of certain types."

He then dwelt much on the sense of the word *Property*, defining it philosophically, and in the separate lights of being corporeal and spiritual; and proceeded to define property in the legal sense of the word, in the following manner:

"Property, of whatever kind, is that which is begun by occupancy, and continued by possession."

Mr. Thurlow said, "that metaphysicians talked of a property in life or limb, in fame, honour, and character; but this was not a language lawyers could adopt. There was also, he said, such a thing as property by specification; he asked under what denomination literary property was to be arranged? Was it corporeal or incorporeal? If corporeal, it was descendible, like any other chattel; if incorporeal, how was its incorporeality to be ascertained? how specifically distinguished from its appendage or adjunct, the corporeal part? To say that a man has a property in the

the ideas of a book, and none in the book itself, is as if one should affirm that a man has a property in the colouring of a picture, but none in the canvass on which that colouring is laid; or as if Mr. Harrison had a property in the discovery made by his time-piece, but none in the wheels or mechanical parts of which it is composed: a notion to the last extreme absurd! Applying this to the case of an author; if he had any distinct exclusive property in a book, separate from the material and corporeal part, I have no objection to admit this exclusive property, (continued the counsel,) provided he will demonstrate to me *quo jure* the property accrues."

The bookfellers, he observed, (exemplifying his observations by several cases) had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly. He was very diffusive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and asserting, that they all specifically proved, that if there had been any inherent right of exclusively multiplying copies, such instances of exerting the royal prerogative would have been unnecessary. He particularly adverted to the statute of the 8th of Queen Anne, maintaining that it was not merely an accumulative act declaratory of the common law, and giving additional penalties, but that it was a new law to give learned men a property which they had not before, and that it was an incontrovertible proof that there previously existed no common law right, as contended for by the respondents. He cited many cases to prove his arguments; some before the 8th of Queen Anne, and others immediately upon that statute, generally inferring that the grand question touching the common law right, had never been decisively determined by any Chancellor.

The Attorney-General then attempted to prove "that no such idea as that of an exclusive right to multiply copies prevailed previous to, or indeed long after, the invention of printing." This was instanced in several cases, where "one writer complained of another for printing his works, not on account of any violation of property, but merely because the party complained of had printed them inaccurately." On the whole, he contended "that Literary Property existed only in the imagination; that it never, till it was found advantageous, entered into the heads of bookfellers themselves; that authors never conceived the notion of any property vesting in them, but what was given by statute, by patent, the licensing act, the royal privilege, or in virtue of the institution of the Stationers Company; that what was called Literary Property only gave rise to a scandalous monopoly of ignorant bookfellers, who fattened at the expence of other men's ingenuity, grew opulent by oppression; and that, as the Lords of Session had freed Scotland

from such a monopoly, he sincerely hoped their Lordships, following so praiseworthy an example, would emancipate this kingdom from such an odious oppression."

MONDAY, February 7th.

The Lords met agreeable to their adjournment the Friday before, and proceeded to hear further counsel on behalf of the appellants, when

Sir John Dalrymple, at the bar, entered into an historical review of what he called this ideal property, which he endeavoured to explain to the following purport:

"It should be considered, my Lords, that this pretended property, which is supposed to have a foundation in common law, cannot in the records of the common law courts any where be found: If you speak of the subject before the act of Queen Anne, you hear of nothing but licensing acts, and the company of Stationers.—My Lords, during the tory reign of King Charles the second the bookfellers were the mere engines of the court's designs, and therefore the licensing act sufficed;—it was the same through the tory reign of King James the second, while it was the court side of every question that could alone be handled with safety; the licensing act gave that property to the bookfellers, which was sufficient for their purpose. In the whig reign of King William they began to move out of the old sphere, and then we accordingly find new movements. In the tory reign of Queen Anne they looked out for fresh securities; then first appeared a new trade. My Lords, the bookfellers then found they could make as much or more by abusing the sovereign, her parliament, her council, her servants, and her government, than they could before make by the support of them. Printing books thus coming into opposition to the court, the trade laboured hard to establish a right to their copies that was independent of the court. They applied every where for the means of establishing that right; but were forced at last to have recourse to parliament to establish and vest in them a right which the common law did not give them.

"My Lords, the history of the act of Queen Anne deserves your Lordships attention: What was the view of the bookfellers? absurdity on the very face of it. They applied for an act, vesting in them a property for fourteen years which they pretend to have derived from the common law, for futurity. Can it be supposed that men who were any ways clear in their perpetual right, would apply for a fresh right for fourteen years only? It could not be. They knew their own situation: they knew the rottenness of their pretended right, and wanted a new real one, instead of the old imaginary one.

"Yet, my Lords, this act, which changed their perpetuity to a term of fourteen years, was obtained at a period when the interests of learning was far from being without

without good support : Addison, after being the friend of many ministers, became secretary of state ; and Swift was high in the esteem, and an adviser of, the heads of another party. Happy would it be, my Lords, if ministers had always such friends, and such advisers !

“ But, my Lords, this act of Queen Anne, which was ushered in under the idea of encouraging literature, was very far from having such a tendency. It was to encourage bookfellers, but not authors ; however, supposing both interests the same,—What did they gain ? Why, a perpetuity was changed to a term of fourteen years only. A price was fixed, and a clause inserted to force them to send copies to public libraries—What encouragements are these ?—They, on the contrary, were discouragements.—All which is sufficient to shew that the bookfellers never dreamed of a serious property at common law for perpetuity ; had they such a notion they would have petitioned against the act.

“ Observe, My Lords, the title of the act : *To vest* the copy rights : that is, my Lords, to *give* them a right they had not before ; a marked expression which could not be mistaken.—And though the word *secured* is used in the body of the act, it does not enter there as the signification of a different idea : it is the same idea : the bill was to vest a new property, and provide accordingly, and inflict penalties, after which the word *secures* occurs, and is used perfectly consistently with the former term.

“ What could be more absurd, my Lords, than an act to vest a perpetual right to a set of persons for a limited term, and inflicting penalties ? Lord Shaftsbury tells us that ridicule is the test of truth : let us try such an act by that test. I will read an imaginary act which enacts such purposes.

(Here he read an act drawn up in the terms of the act of Queen Anne, for vesting the right to hedges and trees in the planters for fourteen years and no longer, laying penalties on persons who cut or broke down such hedges and trees.)

“ Now, my Lords, does it not from hence appear that an act to convert a perpetuity into a limited term is absurd upon the face of it ? And may we not from hence conclude that the bookfellers, when they applied for the act of Queen Anne, knew that they had no perpetual common law right?

“ My Lords, this perpetual right which they want would, instead of being beneficial to the interests of literature, be pernicious to it. It encourages the spirit of writing for money ; which is a disgrace to the writer, and to his very age. My Lords, why should not honour and reputation be powerful inducements enough for authors, without that mean one of profit ? Foreigners know no such exorbitant pecuniary rewards as have disgraced this country. The Germans get nothing by writing.

writing. The Italian states are so small that no literary property can exist, as the bookfellers of one state would immediately print upon those of another.—In France the sums given to authors are too small to have this effect. My friend, Mr. Hume, has told me that Rousseau assured him he had but fourscore Lewis d'ors for the copy of his *Emile*. Such sums as we hear of in England are merely an encouragement to the mercenary spirit of writing, not to the merits of it.

“But farther, my Lords: if you give this perpetual right to publish, you give the same right to suppress. If an author is to have this exclusive right to his works after publication, he may suppress them at will, or at least stop the future publication of them. My Lords, this is not a mere imaginary idea; it is possible, and even probable.

“My Lords, I shall beg leave to state a supposition. Suppose there was a man who, with the utmost diligence and attention, sought into the records of his country, and also of foreign ones, for state-papers to illustrate history; suppose he meet with such success in this employment as to make discoveries of the highest importance: suppose, when his book comes to be published, that instead of receiving that public applause which he might perhaps have reason to expect, he, on the contrary, finds himself hunted down for that very circumstance which ought to have added to his fame. Supposing there was such a man, my Lords, must he not be uncommonly firm and resolute to bear up against the illiberal voice of the publick? must he not be tempted to suppress a book, when he found it thus received, notwithstanding the injury which he would thereby do to, I may say, his country?”

The foregoing is the substance of this laborious pleader's argument; those who were present at the delivery of it, will recollect how far it resembles what it is meant to give those who were not present, some image of.

In the course of the speech, Sir John Dalrymple made a multitude of remarks, many of which seemed calculated to enliven and strengthen his argument; among the most particular was an observation that Printers and Bookfellers were not remarkable for too much modesty; that authors were generally proud, and of so old-fashioned a turn of thinking, that if a great man gave them a promise, they were weak enough to imagine it was to be kept; that Bookfellers were also exceedingly vain, and took every advantage of authors which they could, adding their name to their cause, merely from motives of self-interest: that otherwise they would have got Mr. Addison to have assisted them with his influence while he was in power; that a numerous multiplication of copies was of late date; Shakespear's works had sold but two editions of 500 each in two centuries, and Smollet's History of England, the worst of the many bad Histories of England extant, had sold 11,000 in a very short time; that when large numbers were first printed, the arts of reviling the Sovereign, abusing the Minister, and libelling

libelling every Officer of Government were discovered ; arts happily banished in this quiet era ! that Junius had an enflamed imagination, a weak head, and a worse heart ; that in the cause of Midwinter, both Plaintiff and Defendant resembled fencers with skates on, treading upon ice, as they both went farther than they either of them intended ; that Alexander Donaldson, his client, never printed a work either within the time of the limitation of the 10th of Queen Anne, or in the life-time of the author ; that Booksellers opprobriously termed men who laudably enlarged the circle of literature, by giving new editions of works of merit, pirates ; that procuring the reversal of the decree of the Court of Chancery, would rather be of service to the authors than disservice ; and finally that there were near 20,000 Printers in London.

As the manner of Sir John Dalrymple's proving this latter extravagant assertion is somewhat peculiar, we shall circumstantially recite it. " I happened (said he) to be upon the Streets when a Lord Mayor two years since was coming to the House of Commons, to answer for having discharged a City-printer out of the hands of a Messenger of that House. The cavalcade was numerous ; but I observed only half the number of Printers, who usually make up the mob. I asked the reason of it, and was informed that ten thousand of them were gone to Tyburn to see a brother Printer hanged : so that I found they were divided in opinion whether they should conduct one friend to the gallows, or another friend to the House of Commons."

The above was in substance, if not in words, delivered at the Bar of the highest and most august Assembly in this kingdom, under a specious shew of pleading ; but it is conceived Sir John Dalrymple mistook his situation, or he never would have been the first to have made use of such language to so noble an Assemblage. With respect to the characters and numbers of the Printers, &c. he seems more ignorant of them than he was of those men of virtue by traducing whom he has received so much advantage, or what opinion must the world have of a man who some months before received the enormous sum of near One Thousand Pounds for the compilation of a few Papers, from a Bookseller, and then to stand foremost in opposing his right to indemnify himself by the sale of such Books in perpetuity ?

TUES-

TUESDAY, February 8th.

The Attorney General and Sir John Dalrymple having finished their pleadings on the behalf of the appellants, Mr. Solicitor General and the other counsel were called to the bar, when he spoke for the respondents to the following purport.

He began his speech with a series of compliments to the two counsel on the other side of the question; "one of the learned pleaders, he observed, had entered into the argument with great ability; his definition of the word *property* had been shrewd, metaphysical and subtle; but he hoped to be able to convince their Lordships, that ingenious as the definition of that word had been, it was nevertheless erroneous.

"Literary Property had, by those who had spoke before him, been said to be so abstruse and chimerical, that it was not possible to define it. The interpretation they had put upon the word *property* was, that it implied something corporeal, tangible and material. He begged leave to differ from this opinion, and to point out how common it was for terms to be misapplied as to their import.

"The word *property* had, by the ablest writers, been called *usus utendi, fruendi, disponendi*; it was therefore evident that any idea, although it was incorporeal in itself, yet if it promised future profit to the inventor of it, was a property. And the latter word had, through inaccuracy, been used as describing that, over which a possessor held an absolute reign, dominion, or power of disposal. The subject matter might be immaterial, and yet liable to be appropriated. Property changed its nature with its place: In England, portions of land were private property, among the Arabs and Tartars no such idea prevailed; they looked upon cattle and charnels as the only private property. Among the Americans, in certain districts, land was considered as property, but not as the property of individuals; as the inhabitants lived upon the gains of hunting, a circumference of land, sufficient for them to hunt on, was considered as the general property of one tribe or nation.

"The lawyers mode of describing property was exceedingly trite and familiar; they generally divided it into corporeal and incorporeal, and in the present case it had been said to commence by occupation, and to continue by possession. This was a narrow scale of argument. In the courts of law it was universally admitted that matters incorporeal were nevertheless matters of property, and the lawyers division of it proved that matters not in occupancy or possession, were yet of value, and could be sold or given over, as in the cases of manors and advowsons, remainders and reversions. They could be sold by assignment, and the mode of sale was by title.

Possession

Possession was usually described as originating from two things, livery and grant. Under the latter title, in some degree, stood Literary Property; but it was not to be considered as originating from crown grants, for excepting the prerogative copies, the crown had no right, and in the first of those (the bible) no farther right, than in that particular translation published in the reign of King James.

After a very learned and ingenious argument, as to the qualities of property with regard to its occupancy, its being material, and its adhipiscency, the Solicitor General observed "that every inventor had a right to the profit of his invention; and as he found that Grotius had not escaped the Attorney General's researches, he was much surprised that in his definition of property, the learned pleader had not hit upon a position which was directly in point."

He then read an observation cited by Grotius as having been made by Paulus, a Roman lawyer, who declared that one mode of acquiring property was invention, and that from the nature of things, he who made a matter was the owner of it.

"This, he observed, was a much more liberal construction of the word invention than had been put on it by the other side, who had taken it up in its vulgar acceptance, and only given it allusion to trifles, such as the finding shells on the sea-shore, &c.

"It had been contended, that the maker of an orrery was in the same predicament as an author, when he published. Such allusion came not to the point; the first sheet of an edition, as soon as it was given impression, in a manner loaded an author with the expences of a whole edition, and if that edition was 5000 number, the author was not repaid for his labour and his hazard, till the last of the 5000 were sold. The maker of an orrery was at no other trouble and charge, than the time, ingenuity and expence, spent in making one orrery; and when he had sold that one, he was amply paid. Orrery-making was an invention, and the inventor reaped the profit accruing from it. Writing a book was an invention, and some profit must accrue after publication; who should reap the benefit of it?

"Authors, he contended, both from principles of natural justice, and the interest of society, had the best right to the profits accruing from a publication of their own ideas; and as it had been admitted on all hands that an author had an interest or property in his own manuscript, previous to publication, he desired to know who could have a greater claim to it afterwards. It was an author's dominion over his ideas that gave him his property in his manuscript originally, and nothing but a transfer of that dominion or right of disposal could take it away. It was absurd to imagine that either a sale, a loan, or a gift of a book, carried with it an implied right of multiplying copies; so much paper and print were sold, lent or given, and an unlimited perusal was warranted from such sale, loan or gift, but it could not be conceived that when five shillings were paid for a book, the seller meant to transfer a right of gaining one hundred pounds; every man must feel to the contrary, and confess the absurdity of such an argument."

The Solicitor General produced a copy of the original grant of King James for printing some Poems of his writing, which, excepting some royal stile in the beginning, he observed, ran in the ordinary phrase of an author's assignment of copy-

right to a Bookseller; nay, indeed, it was more ample, for it not only transferred the right of the matter then published, but also transferred a right to every thing he should hereafter be pleased to write.

Among other matters adverted to in this speech, Ames's Typographical History was particularly noticed: the application of the Printers in Prynne's time to suppress and call in the patents for printing and publishing the Bible, was mentioned; the applicants terming those patents a sanction for monopolizers, the matter was heard by counsel, when Prynne pleaded on one side of the question, and his answer turned on nine points, in one of which that celebrated lawyer declared, that the most serious and solid objection against the Printers was the inherent Common Law Right for an Author to multiply copies. This the Solicitor General said was one strong proof that in the worst of times the *jus naturale* respecting Literary Property was not forgot. Licenses in general, he observed, proved not that Common Law Right did not inherently exist, but were the universal fetters of the Press at the times in which Authors were obliged to obtain them.

With regard to the statute of Queen Anne, he was very willing to let that rest on the same grounds as the Attorney General had placed it last Friday, viz. that it gave no right, it took none away. But he could not help observing that it contained a positive clause to let the matter respecting a Common Law right remain precisely in the state in which it was when that act passed: and that the Court of Chancery considered that such a right did exist, was evident from the several injunctions that Court had granted since the enacting of the statute, which did not govern those injunctions, as it did not particularly specify how the Court of Chancery were to act. He instanced the cases of Pope and Curl, Gwynne and Dr. Shebbeare, and two Law Books, as proofs of what he asserted. He mentioned also the case of Doddsley *versus* Kinnerly, in 1761, before Sir Thomas Clark, Master of the Rolls. The former prayed an injunction against the latter, for abstracting a part of Dr. Johnson's *Rasselas*, and publishing such abstract in a Magazine.

The Solicitor General, after noticing the great ability of Sir Thomas, declared that his opinion was the same, respecting Literary Property, as that he had maintained, and after a variety of very ingenious remarks, he concluded his argument, invoking the Lords to sanctify the final determination of a question founded on natural justice, and the interest of society, by affirming the decree.

The Solicitor General, in the course of his argument, paid Mr. Hargrave a very elegant compliment for his publication touching the question. He also adverted to Sir John Dalrymple's publication, and hoped that work would not be suppressed, as he had reason to lament its author intended. And in following the observations made on the other side, he said it was true that Atticus employed his slaves in transcribing, but that even then the expence was so enormous, that although he was a man of great fortune, he was, from a principle of oeconomy, under the necessity of selling his library; and Cicero, who was also a rich man, was, from the same principle, unable to purchase it.

Mr.

Mr. Dunning likewise pleaded in favour of the respondents, which he did by entering into an historical review of the state of this property in different parts of our annals; he observed,

"It has been very falsely asserted, my Lords, that this property, before the act of Queen Anne, was not to be found at common law, and attempts have been made to prove, that no cases of it are to be produced; but, my Lords, this is not reasoning to the purpose; we must consider the times which we examine, and the nature of the property in question: In ages wherein civility had made but small progress, it would be absurd to look for litigations of a property so little valued and so seldom disputed; but, my Lords, the want of precedents in such a case proves nothing against us: there are many unquestionable common law rights for which you can find no precedent, so far back as Richard the Second. How, my Lords, is it to be supposed, that the decisions relative to so peculiar a property are to be clearly ascertained through an age wherein we have only a dim light to view objects of much greater importance? Where would be the equity, if I may so express myself, of our constitution, if we were to establish it by such remote precedents? Can any one wonder that we have only a dim view of this property in ages when nothing was clear but injustice and oppression? The nature of the property shews at first sight that it would be in vain to look far back for decisions in its favour, even supposing that from other circumstances the existence of it was unquestionable.

"My Lords, the little estimation and dubious circumstances that attended the copy right to the *Paradise Lost* of Milton, is no proof against the existence of a decisive right. That poem was so much neglected, that the bookseller had perhaps as much reason to complain of his bargain as the author. It was the fault of the age; and had the same inattention and want of taste continued, the property for which we contend would, perhaps, to this day have never been litigated; but certainly, my Lords, the right in case of litigation would not thereby have been injured.

"Attempts, my Lords, have been made to prove that the establishment of this right would be injurious to literature; a strange assertion surely. It is as much as to say, that rewarding authors in proportion to their merit, is the way to discourage their productions; an argument too weak to make an impression on your Lordships. So very far is this from being the case, that it is evident the money given for copy-rights has increased with the increase of security that has been given to the property. Go back to Milton's time, and from thence advance gradually to Queen Anne's reign, when the act of fourteen years' right was one encouragement to the booksellers, followed by some considerable emoluments in their way to authors; then, my Lords, reflect on the progress which has been made since, and permit me to call your attention on three famous works, Mr. Hume's and Dr. Robertson's histories, and Dr. Hawkesworth's voyages; the sums given for the copies of the former, at that time unparalleled, followed the security of the property, which flowed from several injunctions granted by chancery: and the yet greater sum given for the latter, followed an actual determination of the King's-Bench in favour of this very property.

property. My Lords, I conceive that whoever reads the books will not find it possible to account for the sum in one case so much exceeding those in the other, unless it be attributed to this cause; that the merit of the voyages is to be classed with that of the histories, which will scarcely be allowed; yet the copy-money much exceeded that of the others. In no way is this to be accounted for but by supposing the booksellers liberality to flow from the additional security thus given to their property: and if this is not an encouragement to literature, my Lords, I should be glad to be informed what is an encouragement. It might as reasonably be asserted, that pensions and rewards given by a sovereign to learned men, did not advance the interest of learning.

"My Lords, the very act of Queen Anne has been brought to prove, that there could not be a previous common law right in the copies of books; but, my Lords, nothing can be more futile than such an idea: let me illustrate this by a similar case; there passed an act last session to make turnips, cabbages, potatoes, and carrots property; now, my Lords, might it not be urged with as much justice, that cabbages and so forth were not property at common law? Such an idea would be ridiculous. Acts may pass to regulate property, and to inflict penalties on the invasion of it, without in the least derogating from the principles and foundation of such property.

"We have been farther told, my Lords, that giving the property of copies will be giving the right of suppression; but this I conceive is a groundless idea; we are not to suppose that books of instruction, entertainment, or amusement, will ever be suppressed, and as to books neither instructive nor entertaining, the sooner they are suppressed the better. Certain, however, it is, that on some subjects they are read in proportion to their meriting neglect.

In the course of his pleadings he animadverted upon several parts of the opposite counsels conceptions or explanations of this property. He said it was to him the most extraordinary idea that ever he heard, that it should be admitted that an author had a property originally in his composition, and that the first moment he exercised his dominion over that property, and endeavoured to raise a profit from it, he lost it. Publication he could not conceive was of such a nature to destroy that right to the matter published, which it was acknowledged an author had before it was published.

One part of the argument (he observed) used for the appellants, was, that it would benefit authors, if no exclusive right of multiplying copies existed: this was a very strange assertion, and it was very extraordinary that authors in general should think otherwise. It was customary for Booksellers, as buyers, to buy as cheap as they could, and it was also customary for authors to sell as dear as they could; this could not be the case if the moment a book was published every man had a right to print it.

Authors formerly, when there were but few readers, might get but small prices for their labours, but the books above-mentioned had been paid enormous sums for, especially the last. That if the Purchasers of these Copies had not the sole right of multiplying Copies, how was this difference to be accounted for? not from any

any uncommon generosity in the Bookfellers, not from any superiority in point of merit in the Books, but from the idea of a Common Law Right prevailing, and from that idea's being established by the determination of the Court of King's Bench in the case of Miller and Taylor; for it was idle to contend that the subject of the present appeal was not exactly on the same grounds.

The Appellants wanted to sanctify the importation of Scotch Books into England, in the same manner as the importation of Scotch cattle. The Book on which the present cause was grounded, was written, indeed, by a Scotchman, but it was written in English, and originally printed in England. The Appellants had invaded the legal purchaser, by printing a copy in Scotland, and offering it to sale in London; he hoped, therefore, that their Lordships would teach them that Literary Property was sacred, by affirming the decree.

The House, as soon as Mr. Dunning had finished, adjourned till next Day.

W E D N E S D A Y, *February 9th.*

The Counsel were again called to the Bar, and the Attorney General made his reply to the arguments in behalf of the respondents, when he advanced very little more in substance than what he had already urged, and after Mr. Attorney General had finished his reply, the Lord Chancellor rose up, and put the three following questions to the Judges, viz.

1. Whether at Common Law, the Author of any literary composition had the sole first right of printing and publishing the same for sale, and could bring an action against any person for publishing the same without his consent?

2. If the Author had such right originally, did the Law take it away upon his printing and publishing the said Book or literary composition, or might any person re-print and publish the said literary composition for his own benefit, against the will of the author?

3. If such action would have laid at Common Law, is the same taken away by the statute of Queen Anne? or is an Author precluded by such statute from any remedy, except on the foundation of the said statute?

After the above questions had been twice read, and put to the learned Judges, Lord Camden moved that the two following might also be put, viz.

1. Whether the Author of any literary composition, or his assigns, had the sole right of printing and publishing the same in *perpetuity* by the Common Law?

2. Whether this right is any ways impeached, restrained, or taken away by the 8th of Queen Anne?

They were immediately read by the Lord Chancellor, and put to the Judges accordingly, and then the House adjourned to Tuesday the 15th.

TUESDAY,

TUESDAY, February 15th.

The Lords met, agreeable to their adjournment, and after the dispatch of some private business, proceeded to hear the opinions of the Judges upon the five questions relative to the important cause of Literary Property.

The Chancellor opened the business by observing, that "as the learned Judges might maintain dissimilar opinions upon the subject, their Lordships attendance was required to hear the opinion of each Judge delivered *seriatim*."

Baron EYRE then arose and delivered his opinion with the reasons whereon that opinion was founded, in substance as follows :

He observed, "that great pains had been taken by the ingenious Counsel for the Respondents, to avoid considering the subject as at all connected with *metaphysic subtleties*; that such an attempt, though highly praise-worthy in those who had the interest of their clients at heart, was yet totally impracticable, as every endeavour to disclaim the use of metaphysic reasoning, tended only to shew how necessary it was to the accurate discussion of the subject: That the question, in fact, was respecting a right to APPROPRIATE IDEAS: That the objects over which a right, and in which an *exclusive Property* was claimed, were incorporeal existences, which could not be treated of with any degree of accuracy, without having recourse to the aid of scientific disquisition: That the thinking faculty, common to all, should likewise be held common, and no more be deemed subject to exclusive appropriation, than any other of the common gifts of nature."

Hence the Baron put an absolute *negative* upon the first question, relative to "the Author of a Book, or Literary Composition, having a right *at Common Law* to the exclusive sale of such Book or Literary Composition." This the Baron denied in the most positive terms. He said, "that, from the very nature of the contents of a book, they were incapable of being made objects of Common Law Property; nothing could be predicated of them, which was predicable of every other species of Property subject to the controul, and within the limits of the protection of the Common Law. A right to appropriate ideas, was a right to appropriate something so ethereal as to elude definition; so intellectual as not to fall within the limits of the human mind to describe with any tolerable degree of accuracy. Ideas, if convertible into objects of property, should bear some feint similitude to other objects of property; they did not bear any such similitude, they were altogether *anomalous*. They could not pass by descent to heirs; they were not liable to bequest; no characteristic marks remained whereby to ascertain them; and, were such incorporealities not subject to one of the conditions which constituted the very essence of property original or derivative; were such incorporealities liable to *exclusive appropriation*, by any right founded in the Common Law?"

"No traces, the Baron said, of such a Common Law right were to be found amongst the Greeks or Romans; nor did the municipal Laws of any country warrant the supposition of a right of the kind existing; yet both Greeks and Romans were careful in arranging every matter susceptible of property under its distinct head."

But

But here lay another insuperable difficulty. Admitting ideas liable to exclusive appropriation, and thus to become objects of property; in treating of them as such, "how would you class, how arrange them? Would you recount them as simple, complex, combined, or multifarious? as being so many species *ejusdem generis*? or would you resort to truth and common sense, and say, "they are not to be classed, arranged, defined, or ascertained?" They are not subject to alienation, transmission, grant, or delivery; and yet they are objects of property, to the exclusive right of appropriating which, men are clearly entitled by the Common Law, and by every principle of natural justice!"

The Baron then proceeded to combat this latter principle; for upon a supposition that ideas were produced by a thinking faculty, *common to all men*, the Baron questioned, "whether it was consonant to the principles of natural justice, to appropriate that to the exclusive benefit of *one or a few*, which was designed as a common gift distributed to *all*."

The Baron concluded, that "if the notion of a Common Law right should be reprobated, such reprobation carried with it an explicit answer to the second Question: There being no Common Law right, an action could not be maintained against the re-publishers of an Author's book or literary composition, without his consent."

The Baron next proceeded to brand an exclusive appropriation of literary works, with the epithets of "A MONOPOLY," against every kind of which the Statute of James I. had sufficiently provided. Yet the Baron contended, "that even Monopolies, in some cases, were allowable, but then the state had taken care to allow them only *for a convenient time*."

Previous to the invention of printing, the idea of a Common Law right, the Baron said, had not been suggested; and subsequent to the invention of this useful art, so little notion had Authors of a right at Common Law to exclusive appropriation, that before the institution of the Stationers Company they had recourse to the Legislature for a license, grant, patent, or privilege; that after the institution of the Stationers Company the only mode thought of to secure the appropriation of a literary composition was, "by an Entry in the Records of that Company, and the person in whose name the book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being so much as mentioned on these occasions."

The Baron then reviewed the cases which, by the Respondents Counsel, had been adduced to prove "the sentiments of the Court of Chancery in favour of a Common Law right." But the Baron contended, "that although the Court of Chancery had frequently granted Injunctions, it cautiously avoided giving any final adjudication upon the matter. An *antecedent Common Law* was never hinted at; nor were the injunctions granted in the cases cited, at all in point; they had been granted on the appearance of something fraudulent upon the face of the transaction; as in the case of Pope and Curl."

"Nor did injunctions prove the Chancellor's opinion upon a matter of Common Law Right, in confirmation of which, added the Baron, I will venture an anecdote."

note." "There is a paper now existing, containing some Notes Lord Hardwicke had taken down, which set forth "the sole and exclusive right of an Author at Common Law, to multiply copies for sale." In the margin of which Paper, and opposite to this very passage, there is in Lord Hardwicke's own hand writing a very large Q. which proves that his Lordship entertained doubts respecting the legality of the position."

The Baron then observed, "that the Counsel for the Respondents had slipped over the case of Mechanical Inventions." The Baron thought them highly commendable for so doing, as they were well aware how strenuously every argument drawn from the case of Mechanical Inventions would militate against the interest of their Clients.

The Baron considered a Book precisely upon the same footing with any other Mechanical Invention. In the case of Mechanic Invention, "Ideas were in a manner embodied, so as to render them tangible and visible; a Book was no more than a Transcript of Ideas; and, whether Ideas were rendered cognizable to any of the senses, by the means of this or that art, of this or that contrivance, was altogether immaterial: Yet every Mechanical Invention was common, whilst a Book was contended to be the object of Exclusive Property! So that Mr. Harrison, after constructing a Time-Piece, at the expence of forty years labour, had no method of securing an exclusive Property in that invention, unless by a grant from the state; yet, if he was in a few hours to write a Pamphlet, describing the properties, the utility and construction of his Time-piece, in such Pamphlet he would have a right secured by Common Law! though the Pamphlet contained exactly the same ideas on Paper, that the Time-piece did in Clock-work Machinery! The cloathing is dissimilar; the Essences cloathed were identically the same."

The Baron urged "the exactitude of the resemblance between a Book and any other mechanical invention, from various instances of agreement. There was the same identity of intellectual substance; the same spiritual unity. In a Mechanic Invention the corporeation of parts, the junction of powers, tended to produce some one end. A Literary Composition was an assemblage of ideas so judiciously arranged, as to enforce some one truth, lay open some one discovery, or exhibit some one species of mental improvement." On the whole, the Baron contended "that a mechanic Invention, and a Literary Composition, exactly agreed in point of similarity; the one therefore was no more entitled to be the object of Common Law Property than the other; and as the Common Law was entirely silent with respect to what is called Literary Property, as ancient usage was against the supposition of such a Property; and as no exclusive right of appropriating those other operations of the mind, which pass under the denomination of "Mechanical Inventions was vested in the inventor by Common Law, the Baron, for these reasons, declared himself against the principle of admitting the Author of a Book, any more than the inventor of a Piece of Mechanism, to have a right at Common Law to the exclusive appropriation and sale of the same."

This was an answer to the first and second questions. It was also an answer to the first question proposed by Lord Camden; for if an author had no right at all by common law, he could have none in perpetuity.

But

But admitting him to have had such common law right; in reply to the third and fifth question, which asks, "how far the statute of the 8th of Queen Ann affects the case, or takes away a common law right existing antecedently in an author or his assignees?" Baron Eyre contended, "that every principle of a common law right was effectually done away by this statute." This he essayed to prove from the title, preamble, and certain clauses of the act, from the adoption of the word *vest*, and the mode of expression used, of giving an author an exclusive property for fourteen years, *and no longer*.

The Baron observed "that he knew of no right the crown had at common law to print what were deemed crown copies; such exclusive right originating only from an exertion of the prerogative. Before the invention of printing it was proper for the crown to have copies of the public acts taken from the parliamentary rolls to transmit to the sheriffs of the several counties; and printing being no more than an expeditious art of transcribing copies, the same power, and for pretty much the same ends, continues now to be a part of the crown's prerogative; and as the crown takes care to have the statutes printed for the public promulgation of the law, so by virtue of the same authority, bibles and common-prayer books are printed, and the copies of them thus multiplied for the service of religion, which it becomes the chief magistrate to protect. But no common law right was vested in the crown of thus printing and multiplying crown copies."

Such are the heads, the most material parts of Baron Eyre's opinion against what is called literary property. And if the editor presumes to say that the Baron argued the point with the erudition of a scholar, the acuteness of an able lawyer, and the accuracy of a sound reasoner, such praise cannot be deemed the language of flattery. After a variety of observations in opposition to the arguments of the Solicitor General, Baron Eyre concluded with passing a negative upon the first and fourth questions, and an affirmative upon the second, third, and fifth.

Judge Nares spoke next, and was followed by Judge Ashurst, both of whose opinions were delivered in favour of the common law right of authors.

Mr. Justice NARES began by observing that the historical nature of the case had been so learnedly and fully agitated in the hearing of the house, that he should wave entering into it, but should rather rest his opinion on general conclusions, deduced from principles which arose from fair argument.

He stated to the House why he thought a Common Law right in Literary Property did exist, and why the statute of Queen Anne did not take it away. He observed that he was of Mr. Dunning's sentiments, that as it was admitted on all hands that an author had a beneficial interest in his own manuscript before publication, it was a most extraordinary circumstance that he should lose that beneficial interest the very first moment he attempted to exercise it.

Mr. Justice Nares put several cases to support his argument, and the statute, he said, did not take away the Common Law remedy, although it gave an additional one, as in the case of an action for maliciously suing out a commission of bankruptcy, although the statutes of bankruptcy have provided an additional penalty for that offence by the bond given to the Chancellor. After having spoken near an

hour he concluded with answering the questions in a manner directly opposite to that of Mr. Baron Eyre.

Judge ASHURST then rose, and accorded in the same opinion with Mr. Justice Nares, after tracing the nature of Literary Property, and producing many cogent reasons to prove that such a claim was warranted by the principles of natural justice and solid reason. Making an Author's intellectual ideas common, was, he observed, giving the purchaser an opportunity of using those ideas, and profiting by them, while they instructed and entertained him; but he could not conceive that the vender, for the price of five shillings, sold the purchaser a right to multiply copies, and so get five hundred pounds.

Literary Property was to be defined and described as well as other matters, and matters which were tangible. Every thing was property that was capable of being known or defined, capable of a separate enjoyment, and of value to the owner. Literary Property fell within the terms of this definition. According to the appellants, if a man lends his manuscript to his friend, and his friend prints it, or if he loses it, and the finder prints it, yet an action would lie (as Mr. Justice Yeates had admitted) which shewed that there was a property beyond the materials, the paper and print. That a man, by publishing his book, gave the public nothing more than the use of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheless his property. It had been said, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a case upon the law books, where a hawk with bells about its neck had flown away; a person detained it, and an action was brought at Common Law against the person who did detain it; a book, with an author's name to it was the hawk, with the bells about its neck, and an action might be brought against whoever pirated it.

Since the statute of Monopolies, no questions could exist about mechanical inventions. Manufactures were at a very low ebb till Queen Elizabeth's time. In the reign of James the First, the statute of Monopolies was passed; since that act no inventor could maintain an action without a patent. 'Tis the policy of kingdoms, and preservation of trade, to exclude them. The appellants were contending for the right of printing; but the right of exercising a trade with another man's materials, could not be allowed, either by reason, or natural justice. A miller might grind corn, and a carpenter might build a house; but the first was not warranted in grinding any corn but his own; nor the carpenter in building a house with another man's wood. The cases of Eyre and Walker, and Tolson and Walker, happened since the statute.

With regard to the question; Its being capable of perpetuity, few subjects were so. Even land, the most tangible species of property, might be washed away by the sea, and therefore might be rendered incapable of being perpetually enjoyed. He thought, however, that the respondents were entitled to as full an enjoyment, as the nature of the case could allow.

As soon as Judge Ashurst had concluded, he informed the house that Judge Blackstone was ill with the gout, but had sent his written opinion, which he read to the House; Judge BLACKSTONE in general Terms, answered the five questions, and was

was of the same opinion with his bretheren, Mr. Justice Nares, and Mr. Justice Ashurst. The further hearing was postponed till Thursday.

THURSDAY, February 17th.

Mr. Justice Willes, Mr. Justice Aston, Mr. Justice Gould, Mr. Baron Perrot, and Mr. Baron Adams, gave their several opinions.

Mr. Justice WILLES spoke first, and after having shewn of what species of property the author's copy-right stood; that it was estate personal, that it was assignable, and that every man conceived what it meant; he declared it as his opinion, that an author had an indisputable power and dominion over his manuscript; that that power was not alienated when the manuscript was printed and published; that the author had an exclusive right of multiplying copies according to the common law, which was founded on reason and truth. This claim of right began with printing, and for the especial reason, because copies could not be easily multiplied but by the press; and therefore, that from which no profit could be got, was hardly a property.

In the course of the arguments this claim had been called by the odious name of a monopoly. This was a popular argument; but *argumenta ad populum* were not always well founded; and upon proper investigation, this appeared to be more specious than real.

After a variety of learned observations and several instances cited to prove that copy-right did exist independent of patents, privileges, star-chamber decrees, or the statute of Queen Anne; particularly the case of Tilotson's sermons, for the copy-right of which the Arch-bishop's family received twenty-five hundred pounds after the expiration of the licensing act, and previous to the act of Queen Anne; Judge Willes gave his opinion upon the first, second, and fourth questions, that at common law an author had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without consent; and likewise that, after publication, an author or his assigns, had an exclusive right in perpetuity of multiplying copies.

He then proceeded upon the statute of Queen Anne, which he declared did not take away that right. It was, he observed, an act very inaccurately penned, but nevertheless it conveyed to his mind no idea of the legislature's entertaining an opinion that, at the time of passing it, there was no common law right; the word vesting appearing in the title had given rise to such an idea, but the preamble contradicted it in the fullest manner; the words of it were, "Whereas certain printers and booksellers have taken the liberty of printing and reprinting, &c. &c." the phraseology of this sentence plainly proved, that a known right previous to that statute existed; the legislature would not have termed the exercise of what was common to all, taking a liberty, had they not understood that a right in perpetuity existed at common law, the words of the preamble to the bill would probably have been, "Whereas certain printers and booksellers claim a right of printing, &c." And the intention of the word printing shewed that the idea prevailed that an author's property went farther than the first publication.

The university of the saving clause, Judge Willes observed, convinced him that the right at common law, which he had supposed to have existed antecedent to that act, was left untouched by it. That it was not a particular salvo for the universities, and the holders of copy-right by patent, but that it was general, mentioning the words "all persons."

Having by a multitude of forcible arguments maintained the doctrine of a perpetuity, he answered the third and fifth questions by giving it as his opinion that an action at common law was not any ways impeached, restrained, or taken away by the statute of Queen Ann; nor was the author precluded by such statute from any remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby.

Mr Justice Aston next gave his answer, beginning with reading a learned Judge's sentiments in favour of literary property, as reported by Sir James Burrow; he agreed with the three Judges who had spoke before him, that it was a property, and that it belonged to an author independent of any statutory security. It was not necessary, he observed for any man to advert either to the Grecians or Romans to discover the principles of the common law of England. Every country had some certain general rules which governed its law; that our common law had its foundation in private justice, moral fitness and public convenience; the natural rights of every subject were protected by it, and there did not exist an argument which would amount to conviction that an author had not a natural right to the produce of his mental labour. If this right originally existed, what but an act of his own could take it away? By publication he only exercised his power over it in one sense; when one book was sold it never could be thought that the purchaser had possessed himself of that property which the author held before he published his work. A real abandonment on the part of the first owner must have taken place, before his original right became common.

In all abandonments, Judge Yeates had defined, that two circumstances were necessary; an actual relinquishing the possession, and an intention to relinquish it; in the present case neither could be proved. Many manuscripts had not been committed to the press till years after they were written, the possession of them for a century did not invalidate the claim of the author or his assigns. With regard to mechanical instruments, because the act against monopolies had rendered it necessary for the inventors of them to seek security under a patent, it could be no argument why in literary property there should be no common law right. He thought it would be more liberal to conclude, that previous to the monopoly statute, there existed a common law right, equally to an inventor of a machine, and author of a book.

After a variety of arguments drawn from the nature of the property, and the construction which would rationally be put upon the act of publication, Judge Aston gave his opinion in favour of the first, second, and fourth questions.

With regard to the statute of Queen Ann, he observed that it was no more than a temporary security, given by the legislature to the author, enabling him to recover penalties, and bring a matter of complaint against any person who printed upon him to a more certain issue than by an action at common law. It was an act passed for the encouragement of learned men, and being so termed in its title, it was a sufficient

sufficient proof that it was no bar to the common law right which existed previous to its being enacted. He read the preamble, and contended that it was evident from the wording of it, that it meant to give an additional security to a right, which they who passed the act knew existed. Besides, the manner of passing it spoke in favour of this idea. He had seen the original bill as presented to the committee appointed to bring it in, and it then had a long flourishing preamble, which the committee struck out. Those who were sanguine for the petitioners, begged a perpetuity by statute. The enemies to them at first refused to grant any statutory security. The bill gave particular trouble in passing; there were several conferences between the two houses upon it; and the very day it passed, it was so backward, that the Queen did not come to the house till three in the afternoon. Besides, the saving clause was clearly a salvo to the common law right. The idea was as forcibly expressed, as words could express.

After citing the injunctions granted by the court of Chancery, and arguing upon the multitude of circumstances deducible in favour of *Literary Property* from the natural rights of the subject, the immediate nature of the property, the idea uniformly entertained of its existence from the era of the commencement of printing to the present day, as well as his construction of the statute of Queen Anne, he gave his answer to the third and fifth questions, declaring it his opinion that an action at common law was not any ways impeached, restrained, or taken away by the 8th of Queen Anne.

Baron PERROT spoke next, and began by observing, that the argument for the existence of a common law right, and the definition of *Literary Property*, as chattel property, was in his idea exceedingly ill-founded and absurd. If *Literary Property* was a chattel, then upon the death of the possessor of a manuscript, any simple contract creditor might oblige his family or assigns to give it up and suffer him to print it. An author certainly had a right to his manuscript; he might line his trunk with it, or he might print it. After publication, any man might do the same, their Lordships might turn printers if they chose, and print it. From the patents, the privileges, the star-chamber decrees, and the licensing acts, it was evident that in those days no idea was entertained of an author's having any claim to the exclusive right of printing what he had once published: If a manuscript was surreptitiously obtained, an action at common law would certainly lie for the corporeal part of it, the paper. So if a friend to whom it was lent, or a person who found it, multiplied copies, having surrendered the original manuscript, he had surrendered all that the author had any common law right to claim.

He spoke of the right under patents and privileges as a right petitioned for by printers without any thought of an author's entertaining an idea that he had any claim. As to the Stationers Company, surely we were not to look for the common law among them. All their rules and orders were for the security of such peculiar works as their own members had been wont to print. An inventor of a machine or mechanical instrument, like an author, gave his ideas to the public. Previous to publication, he possessed the *jus utendi, fruendi, et disponendi*, in as full an extent as the writer of a book; and yet it never was heard that an inventor, when he sold one of his machines, or instruments, thought the purchaser, if he chose it, had not a right to make another after its model. The right of exclusively making any mechanical

Mechanical Invention was taken away from the Author or Inventor by the Act against Monopolies of the 21st of James the First. Which Act saved prerogative Copy Rights; and which would have mentioned what was now termed Literary Property, had an idea existed that there was a Common Law right for an Author or his Assigns exclusively to multiply copies. The argument, that when a book was published and sold, there was an implied contract between the Author and Purchaser could not be maintained. The Purchaser bought the paper and print, the corporeal part of his purchase; and he bought a right to use the ideas, the incorporeal part of it.

The doctrine of implied contracts would not hold, as it was improbable. The Author sustained a loss, but no injury, from another's printing his copy. *Damnum sine injuria* was an established maxim of Law. As another by multiplying copies reaped profit, the original Author sustained a loss, but he sustained no injury. To be injured, a man must lose his right; that right must be founded in law; and where the Law gives no remedy, an author can claim no right; the matter is common to all. It had been said that a declaration had been filed on an action at Common Law, for the invasion of copy right; but it had not been found, although every Law Book had been ransacked for the purpose, that a trial was ever had at Common Law. An incontrovertible proof that there was not a lawyer in Westminster-hall who supposed that there existed any right at Common Law. The present claim was neither more nor less than a claim for a monopoly, and all monopolies were odious to the Common Law.

The Baron contended that the arguments of the counsel, and the opinions of those on the other side of the question were more ingenious than convincing. He therefore answered the first, second and fourth questions in the Negative, being fixed in opinion that there never existed a Common Law right, and that an Author had no claim to his Manuscript after publication.

Respecting the Statute of Queen Anne, he was perfectly convinced that it was the only security that Authors or Booksellers had. That it gave a right for 14 years to the holders of copies, and after that period the right reverted to the Authors for 14 years longer. The Baron said he could not speak to the Act, without having it in his hand; he first read the title, and declared that all the metaphysical subtlety or definition which the ablest logician could muster, could not give any other sense to the words "for the Encouragement of learning, and for vesting a right in authors," than a creation of a property, not a further security for one. He then read the preamble, and went through the act sentence by sentence, particularly investigating the meaning of each clause, and drawing from its meaning strong arguments in favour of the opinion he was laying down. The words, "*and no longer,*" he declared were clear and conclusive; out of the power of argument to surmount. They shewed that the legislature thought it a great favour to grant any, even a limited security, and that they might not be misunderstood, they expressed their idea in the fullest terms. After these words it was in the highest degree absurd to contend that any saving clause could be so construed as to affect, and indeed destroy the most substantial meaning of the enacting part of the act. The saving clause was evidently a salvo for those who held a patent-right to copies; and as it would

would have been tedious to have enumerated all, the Universities were mentioned, as being the greatest holders under that kind of description.

The Baron enforced this observation, and the conclusion he drew from the words *and no longer* in the enacting clause, by citing a case of an attainder in the reign of Edward the VI. being taken off by an act of parliament many years afterwards, which act, in the enacting clause, took off the attainder in the fullest and most entire manner, and afterwards contained a saving clause for certain leases granted by the King, who passed the bill of attainder. One of the holders of these leases brought an action against the family relieved from the attainder, and grounded his claim upon the saving clause; but the court adjudged against him, for that the attainder being entirely taken off by the enacting clause, it was idle to contend that any saving clause could impeach it, or secure a right held under the idea of the attainder.

With regard to the injunctions cited on the occasion, the Court of Chancery must have uniformly mistaken the law, if they had not granted them under the idea of the statute.

The act itself gave no more remedy with its penalties, than it did without them. An author in the first was allowed to damask all the books pirated upon him; by damasking he understood, turn to waste paper and line trunks, which linings were figured like damask. What remedy was this? none in the world. Then again, a penny per book was to be recovered, half of which went to the informer and half to the King; here therefore the author got nothing. The statute afforded him grounds for a remedy in equity. The Court of Chancery, by an injunction and a decree, not only stopped the sale of the pirated copies, but also obliged the pirate to account for what he had sold. This was a satisfaction; this was an actual and an effectual remedy. To suppose that the saving clause maintained a perpetuity of property, was to suppose that the act granted an author fourteen years *and no longer*, except *for ever*, which was so barefaced, so egregious an absurdity, that no man of sense could be the dupe of it. That the Court of Chancery had never dreamt of a Common Law Right, he proved by citing a case between the Stamp Office and a news-paper printer; a printer got into the Fleet, and there printed news-papers without stamps. The Stamp Office prayed an injunction, the Court refused it, and told them the statute having enacted, that a penalty was to be paid on conviction, that they must prosecute to conviction under the statute, and they had a right to the penalty, but they could not upon the principles of Common Law prevent the printer from continuing his trade. This proved that statute laws were unnecessary where remedies could be had at Common Law.

After the Baron had severely animadverted on the printers who claim the right of perpetuity, and instanced many cases, all tending to corroborate his opinion, he concluded his speech by affirming that there was no right at Common Law previous to the 8th of Queen Ann, and that if there was, that statute entirely and effectually took it away.

Mr. Justice Gould agreed, that an author had a right at Common Law to his manuscript, previous to publication. With regard to the statute of Queen Anne, he

he conceived that the act entirely took away any previous right that an author might have, and that an author was precluded by such statute from any remedy, except on the foundation of the same statute, and the terms and conditions prescribed thereby. This answer he gave to the third and fifth question.

Baron ADAMS entered very learnedly into the nature of patents, privileges, and grants of the crown; traced them respecting books to a very early period, and cited a variety of instances, all tending to prove, that till of late years, no idea was entertained that a Common Law right existed respecting Literary Property. He was clearly of opinion that, previous to the statute of Queen Anne, authors and printers had no security but by patents. He therefore answered the first, second, and fourth questions in the negative. The Baron answered the third and fifth questions also in the negative.

M O N D A Y, *February 21.*

Lord Chief Baron SMYTHE gave his opinion concerning Literary Property. In answer to the first, second, and fourth, he observed, that the cases proved, and it was allowed, that it was property previous to publication, and that publication could not alter it; for that publication neither made it a sale, a gift, a forfeiture, nor an abandonment, which were the only ways that a person could part with his property. When a man published his manuscript, he sold to one person only one book, and the use of that one book, without any design of allowing the purchaser to multiply copies: if he gave a book away, he gave it under the same restrictions; a forfeiture always implied a crime, and then the right of property became vested in the Crown; an abandonment could not be without an intent of relinquishing his right; and such intent was not deducible from a publication of the ideas written by an author. In the cases of Pope and Curl, the letters were the property of those to whom they were sent; but the ideas remained as matter of right vested in the sender. In the case of Lord Shaftesbury's manuscript, the same deduction followed; for Mr. Gwynne sold to Shebbeare what he had no authority from the author, (Lord Shaftesbury) or his assigns, to dispose of. There was no act of dishonesty on the part of Shebbeare, although the manuscript was surreptitiously obtained, and the family had a remedy.

Some lawyers, yet alive, remembered the case of Lord Chief Baron Gilbert's manuscripts, which he devised to Baron Clarke; the Baron never published them, but a hackney writer, whom he employed, took an opportunity of copying them, and these stolen copies were committed to the press. The same argument lay against pirating after, as before publication.

It had been mentioned, that a man made his landed estate common, by giving a part of it to the highway; but it surely would not be contended, that although he gave a part of his estate for such a purpose, that any person but himself had a right

right to the trees on it, or the mines beneath it. He adverted to the case of *Basket* and the University of Cambridge, and declared that the argument was then grounded on these principles. This case was reported in Burn's Ecclesiastical Law.

He cited likewise the cases, which, both at the bar and by the Judges, had been mentioned of *Eyre* and *Walker*, and others, all of which were after the 21 years were expired, and which, redress being obtained, spoke in favour of the Common Law Right. He instanced also the case of the *Sessions Paper* as corroborative of this opinion, and observed, that in order to alarm their Lordships' passions, two very odious names had been thrown out, perpetuity and monopoly; neither of which, he thought, applied to the present claim. The first was entirely out of the question, and the latter, Lord Coke had defined to mean a grant from the Crown, to vend any single matter.

As to mechanical inventions, he did not know that previous to the act of 21 James I. an action would not lie against the person who pirated an invention. An orrery none but an astronomer could make; and he might fashion a second, as soon as he had seen a first: it was then in a degree an original work. Whereas, in multiplying an author's copy, his name as well as his ideas were stolen, and it was passed upon the world as the work of the original author, altho' he could not possibly amend any errors which might have escaped in his first edition, nor cancel any part which subsequent to the first publication appeared to be improper.

After several other observations, tending to prove that an author had a right at Common Law, both before and after publication, he answered the first, second, and fourth questions in the affirmative.

The statute of Queen Anne, he looked upon as a compromise between authors and printers contending for a perpetuity, and those who denied them any statute right. There were general rules for the construction of all statutes. One was that it should never be interpreted so as to be unreasonable; another, that no clause could be construed so as to make it inconsistent with any former clause; it should neither be repugnant, nor inconsistent. With regard to this statute, we must not reject the saving clause, nor the motive for which it was made, viz. the advancement of learning. The word *vesting*, if it could be tortured so as to tell against the present claim, was sufficiently qualified and done away by the word *secure*, which occurred in the enacting clause, and which plainly implied a security for something pre-existing. That the preamble gave full authority to this construction, the word *re-printing* particularly implying a right after the first publication; and the word *purchaser*, (which was one of the parties mentioned by the act as being secured in their property) indicated most amply a previous right, for nobody could be thought to purchase what another had not a right to sell. The Baron said that the statute afforded the holders of copy-right a more efficacious remedy than the Common Law, but that it by no means impeached, restrained, or took away the Common Law right. He therefore answered the third and fifth questions in the negative.

The Substance of Lord Chief Justice DE GREY's Speech.

With respect to the first question, there can be no doubt, that an author has the sole right to dispose of his manuscript as he thinks proper; it is his property, and till he parts with it, he can maintain an action of trover, trespass, or upon the case against any man who shall convert that property to his own use; but the right now claimed at the bar, is not a title to the manuscript, but to something, after the owner has parted with, or published his manuscript; to some interest in right of authorship, to more than the materials or manuscript on which his thoughts are displayed, which is termed Literary Property, or an exclusive privilege of multiplying copies of the manuscript or book, which right is the subject of the second question proposed to us.

Now if there exists any incorporeal right or property in the author detached from his manuscript, no act of publication can destroy it. Can then such right or property exist at all? Does such a right come within the knowledge or reach of the common law? In answer to the first of these queries, I acknowledge, tho' this claim of property is abstract and ideal, novel and refined, it is yet intelligible, and may as easily be made to exist for ever as for a term of years; but in order to know whether it is so protected by law, a preliminary question is necessary, Whether it has been so determined in its favour by the great and learned men who have been my predecessors, in regular course of judicature; it is not for me to shake a respectable series of decisions, and unhinge the foundations of an established right, by any *a priori* reasoning of my own; but after investigating the decisions of the courts of common law, I can find no such determinations. What is common law now, must have been so 300 years ago when printing was invented. No traces of such a claim are to be met with prior to the restoration. Very few cases of this kind happened in Charles the Second's time, or before the licensing act, and those few were determined upon the prerogative right of the Crown. The executive power of the Crown drew after it this prerogative right, which extended to all acts of parliaments, matters of religion, and acts of state. The case of Baskett and the University of Cambridge, which was a late one of the same kind, appeared upon the pleadings to be a question arising between two parties who claimed under concurrent and inconsistent grants of the crown. My late honourable and learned friend (Mr. Yorke) who argued that case, endeavoured to shew that his client's right might arise from the power of the crown, and to illustrate his argument, said, it might perhaps be "property founded on prerogative,"—a language, however allowable for counsel, not very admissible by, or intelligible to a judge, but the certificate in the above case does not say a word of property, and indeed if such a claim as that had been founded on property, every one would have as good a right to publish abridgments of the statutes, as of any other book.

Lord Northington granted injunctions on behalf of publications which he considered as matters of state, but left such works as "The Whole Duty of Man," to their common remedy at law. When works of literature, encouraged by the facility of printing, began to spread, we find the cases multiply. Of these, however, I lay

lay entirely out of the question, all those which appear to be cases between rival patentees of the crown; all those relating to the Stationers Company; all those concerning religion, law, or the state; and all unpublished manuscripts.

I shall premise too, before I examine the cases which happened after the statute, that I am of opinion that the statute gives authors and their assigns, a general right not connected with the penalty, and that statutable right falls under the protection of a court of equity; and may claim the benefit of an injunction. To obtain such an injunction, it is by no means necessary that the plaintiff should make out a clear indisputable title. It may be granted on a reasonable pretence, and a doubtful right, before the hearing of the cause; nor is it objection that the party applying for it has a remedy at law. No bill for an injunction is to be found before the statute.

The causes which have come before the Court of Chancery, since the statute, I find to be 17 in number; of these eight were founded on the statute right: in two or three, the question was, whether the book was a fair abridgement, and all the rest were injunctions granted *ex parte*, upon filing the bill, with an affidavit annexed. In these cases the defendant is not so much as heard, and can I imagine that so many illustrious men who presided in the Court of Chancery, would, without a single argument, have determined so great and copious a question, and which has taken up so much of your Lordships time? In fact, none of them wished to have it said, he had formed any opinion on the subject.

In the famous case of Tenson and Walker, of which I have an accurate note of my own taking, Lord Hardwicke said, before the defendant's counsel began to argue, "I am inclined to send a case to the judges, for I doubt whether the matter has been judicially determined, but wish to hear what the defendant says as to Dr. Newton's notes; however I determine the general question either upon the Common Law or the statute." The master afterwards reported the variations between the two books to be colourable and illusory only, and therefore the injunction was made perpetual. Since that time during the last 20 years, or more, the main question has been fluctuating, and in agitation.

From my own experience at the bar, I know that the successive Chancellors and Masters of the Rolls, Lord Northington, Lord Camden, Sir Thomas Clark, &c. have all looked upon the case as undetermined; it may now therefore be fairly treated as a new question, and indeed it has been argued as such upon general principles. Let us consider what weight those principles have which are laid down as the foundation of this new species of property; I have heard but of one, namely, that such a claim is consistent with the moral fitness of things. This idea of moral fitness is indeed an amiable principle, and one cannot help wishing all claims derived from so pure a source might receive all possible encouragement; but this principle is no universal rule of law, nor can it be made to apply in all cases. Beautiful as it may be in theory, to reduce it into the practice and execution of Common Law, would create intolerable confusion; it would make laws vain, and judges arbitrary; nor is it possible to support the respondents claim upon these principles and not allow their operation, in a variety of other cases, where it is confessed on all hands they cannot be allowed.

Abridgements of books, translations, notes, as effectually deprive the original author of the fruit of his labours as direct particular copies, yet they are allowable.

The composers of music, the engravers of copper plates, the inventors of machines, are all excluded from the privilege now contended for; but why, if an equitable and moral right is to be the sole foundation of it? their genius, their study, their labour, their originality is as great as an author's, their inventions are as much prejudiced by copyists, and their claim in my opinion stands exactly on the same footing; a nice and subtle investigation may perhaps find out some little logical or mechanical differences, but no solid distinction in the rule of property that applies to them can be found.—If such a perpetual property remains in an author, and his right continues after publication, I cannot conceive what should hinder him from the full exercise of that right in what manner he pleases; he may set the most extravagant price he will upon the first impression, and refuse to print a second when that is sold. If he has an absolute controul over his ideas when published, as before, he may recal them, destroy them, extinguish them, and deprive the world of the use of them ever after; his forbearing to reprint is no evidence of his consent to abandon his property, and leave it as a derelict to the public.

But it is said, that the sale of a printed copy is a qualified or conditional sale, and that the purchaser may make all the uses he pleases of his book except that one of re-printing it; but where is the evidence of this extraordinary bargain? or where the analogy of law to support the supposition? In all other cases of purchase, payment transfers the whole and absolute property to the buyer: there is no instance where a legal right is otherwise transferred by sale, an example of such a speculative right remaining in the seller; it is a new and metaphysical refinement upon the law, and laws, like some manufactures, may be drawn so fine as at last to lose their strength with their solidity.—When printing was first introduced, Cardinal Wolsey warned King Henry VIII. to be cautious how he encouraged it, as a matter which might be dangerous to the state. The event however did not prove it so, and therefore the statute of the 21st of James I. excepted it, as a reasonable and allowable monopoly.

The subsequent licensing act, gave only an adventitious right; and thus it rested till the statute of Queen Anne. The statute certainly recognizes no Common Law right, *hinc ille lachrymæ!* Nor can I suppose this omission happened through ignorance or inadvertence, when I see such great law-names as Holt, Cooper, Harcourt, Somers, &c. in the list of that parliament. This act adopts the language of the old privileges in terms, 14 years had been the term before granted to inventors, a specification of the work too, as in the case of machines, was prescribed; nor do I recollect an instance where a statute gives such a temporary remedy as is here granted in aid of an absolute Common Law right.

If such a right existed at Common Law, and it remained unimpeached by that statute, why that anxiety in authors and booksellers afterwards to obtain another sanction for their property? Whence those different applications to parliament, in the year 1735, 1738, 1739, for a longer term of years, or for life in this kind of property, and afterwards to get an act to prohibit the liberty of printing books in foreign kingdoms, and sending them back again. The truth is, the idea of a Common Law right in perpetuity, was not taken up till after that failure in procuring a new statute for an enlargement of the term; if (saith the parties concerned) the legislature will not do it for us, we will do it without their assistance, and then

we

we begin to hear of this new doctrine, the Common Law right, which, upon the whole, I am of opinion, cannot be supported upon any rules or principles of the Common Law of this kingdom.

The Chief Justice answered the first question in the affirmative; the second and fourth in the negative; and the third and fifth in the affirmative.

Lord Chief Justice MANSFIELD declined giving his opinion.

THURSDAY, February 24th.

The substance of Lord CAMDEN's speech.

"After what the Lord Chief Justice yesterday so ably enforced, there will be little occasion for me to trouble your Lordships; nor will the present state of my health, and the weakness of my voice, allow me to exert myself, were I ever so much inclined; but the nature of my profession, and the duty I owe to this house, will not suffer me to remain silent, when so important a question is to be determined. The fair ground of the argument has been very truly stated to you by the Lord Chief Justice; I hope what was yesterday so learnedly told your Lordships, will remain deeply impressed on your minds.

"The arguments attempted to be maintained on the side of the respondents were founded on patents, privileges, star-chamber decrees, and the bye laws of the Stationers Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom: and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises in which it could not possibly have existence.

"They began with their pretended precedents and authorities, and they endeavoured to model these in such a manner, as to extract from them something like a common law principle, upon which their argument might rest. I shall invert the order, and first of all lay out of my way the whole bed-rol of citations and precedents which they have produced: that heterogeneous heap of rubbish, which is only calculated to confound your Lordships, and mislead the argument. After the first invention of printing, the art continued free for about fifty years. I mean to lay no stress upon this; I mention it only historically, not argumentatively; for as the use of it was little known, and not very extensive, its want of importance might protect it from invasion; but as soon as its effects in politics and religion were felt, all the crowned heads in Europe at once seized on it, and appropriated it to themselves. Certain it is, that in England, the crown claimed both the power of licensing what should be printed, and the monopoly of printing. Two licenses were granted to those who petitioned for them. An author not only was obliged to sue for a licence to print at all, but he was also obliged to sue for a second licence that he might print his own work.

"When the King had once claimed the right of printing, he secured that right by patents and by charters. Still further to secure his monopoly, he combined the printers, and formed them into a company, then called the Stationers Company, by whose laws, none but members could print any book at all. They assumed powers of seizure, confiscation and imprisonment, and the decrees of the star-chamber confirmed their proceedings. These transactions, I presume, have no relation to the common law; and when they were established, where could an author, independent.

dent of the company, print his works, or try his right to it? Who could make head against this arbitrary prerogative, which stifled and suppressed the common law of the land? Every man who printed a book, no matter how he obtained it, entered his name in their books, and became a member of their company: then he was complete owner of the book. Owner was the term applied to every holder of copies; and the word author does not occur once in all their entries. All societies, good or bad, arbitrary or illegal, must have some laws to regulate them. When an author died, his executors naturally became his successors. The manner in which the copy-right was held, was a kind of copyhold tenure, in which the owner has a title by custom only, at the will and pleasure of the Lord. The two sole titles by which a man secured his right was the royal patent and the license of the Stationers company; I challenge any man alive to shew me any other right or title; Where is it to be found? some of the learned Judges say the words *or otherwise* in the statute of Queen Anne relate to a prior common law right; To what common law right could these words refer? At all the periods I have mentioned the common law rights were held under the law of prerogative. It was the general opinion that there was no other right, and the corrupt Judges of the times submitted to the arbitrary law of prerogative. In the case of the Stationers Company against Seymour, all the Judges declared that printing was under the direction of the Crown, and that the Court of King's Bench could seize all printers of news, true or false, lawful or illicit. But if it was made use of to protect authors, what was this protection? a right derived under a bye law of a private company. A protection similar to that which we give the great Mogul; when we want any grant from him, we talk submissively, and pay him homage, but it is to serve our own purpose, and to feast him with a shadow that we may attain the substance. In short, the more your Lordships examine the matter, the more you will find that these rights are founded upon the charter of the Stationers Company and the royal prerogative; but what has this to do with the common law right? for never, my Lords, forget the import of that term. Remember always that the common law right now claimed at your bar is the right of a private man to print his works for ever, independent of the crown, the company, and all mankind. In the year 1681 we find a bye law for the protection of their own company and their copy-rights, which then consisted of all the literature of the kingdom; for they had contrived to get all the copies into their own hands. In a few years afterwards the revolution was established, then vanished prerogative, then all the bye laws of the Stationers Company were at an end; every restraint fell from off the press, and the old common law of England walked at large. During the succeeding fourteen or sixteen years, no action was brought, no injunction obtained, although no illegal force prevented it; a strong proof, that at that time there was no idea of a common law claim. So little did they then dream of establishing a perpetuity in their copies, that the holders of them finding no prerogative security, no privilege, no licensing act, no star chamber decree to protect their claim, in the year 1708 came up to parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce parliament to grant them a statutory security. They obtained the act. And again and again sought for a further legislative security.

“ Thus

“ Thus, my Lords, stands the pretence on the score of usage, of which your Lordships have heard so much on one side the question. I come now to consider upon what foundation stand the prerogative copies; and these were in fact cases between co-patentees (for I must consider the Stationers Company itself as a patentee of the crown), and no authorship right occurs here. The right in the crown is supposed to come either from purchase or contract; and our law argues from principles, cases, and analogy; but not a word of this in the judgment of the court; but the arguments of counsel are adduced to prove the point. The argument of counsel is a sorry kind of evidence indeed, in most cases it would be very dangerous to rely on it, but here it is such stuff as I am ashamed to mention. You have them at length in Carter. First, it is put on the topic of prerogative, next of ownership. 1. Henry the sixth brought over the printers and their presses, *ergo*, say the counsel, he has an absolute right to the whole art, and all that it can produce. 2. Printing belongs to nobody, and what is nobody's is of course the King's. 3. The King pays his Judges, *ergo*, he purchases that right for a valuable consideration. 4. He paid for the translation of the Bible, therefore, forsooth, he bought a right to sell bibles. Away with such trifling! Mr. Yorke put it on its true footing. Ought not the promulgation of your venerable codes of religion and of law to be intrusted to the executive power, that they may bear the highest mark of authenticity, and neither be impaired, or altered, or mutilated? These printed acts are records themselves, are evidence in a court of law, without recurring to the original parliamentary roll. Will you then give this honourable right to your Sovereign as such? or will you degrade him into a Bookseller? indeed, had he no other title to this distinction, that could hardly be maintained. But if this will not serve the purpose, recourse is next had to injunctions; they, it is said, have put the right out of doubt: nay, Lord Hardwicke's name is triumphantly brought on the stage, and he is declared to have absolutely decided the point: no man, I am sure, can venerate his name (which will be dear to posterity as long as law and equity remain) more than I do. But this boasted case, like all the rest that have been produced, entirely fails in the proof; and when my Lord Chief Justice read his own note of what Lord Hardwicke said upon the occasion, it appeared that Lord H.'s words had been twisted to an opposite meaning to what he intended. All the injunction cases have been ably gone through. I shall only add, in general terms, that they can prove nothing: they are commonly obtained for the purpose of staying waste, and the prevention of irreparable damage. They must therefore in their nature be sudden and summary, or the benefit of them would be lost before they are obtained, and they are granted though the right is not clear, but doubtful. The question, whether I can maintain my right against the devisee or the heir at law, may be discussed afterwards at leisure; but unless upon shewing a reasonable pretence of title you in the mean time tie up the spoiler's hands who is selling my timber, or ploughing my pasture, my remedy is gone, or comes too late to prevent the mischief. What then if a thousand injunctions had been granted, unless the Chancellor at the time he granted them had pronounced a solemn opinion, that they were grounded upon the common law? it would only come to this at last, that the right in question was claimed on one side and denied on the other: therefore till the matter was tried and determined, let the injunction go. Lord Hardwicke after twenty years experience, in the last case of

the kind that came before him, declared that the point had never yet been determined. Lord Northington granted them on the idea of a doubtful title; I continued the practice upon the same foundation; and so did the present Chancellor. Where then is the Chancellor who has declared *ex cathedra* that he had decided upon the Common-Law right? Let the decision be produced in direct terms. It is amazing that we should have been so long amused with this kind of argument from such vague authorities!

“At length, my Lords, having removed every stumbling-block that opposed our progress to the pure source of Common Law; having cleared the way of all those spurious, pretended authorities, which will not bear the test of a moment’s serious examination, the question begins to assume its natural shape: Here then I feel myself upon my own ground, and I challenge any man to produce any adjudication, a precedent, a case, or any thing like legal authority on which this claim can be grounded. Does there a Scintilla, a glimpse of Common Law appear under any of those different heads I have mentioned, and which have been so often repeated to us? For my own part, I find nothing in the whole that favours of Law, except the term itself, *Literary Property*. They have borrowed one single word from the Common Law, and have raked into every store house of literary lumber to find out how to apply it to the subject, and to deduce some principles to which it may refer, and be governed by. And now what are they? What are the foundations of this claim in the English Common Law? Why, in the first place, say the Respondents, every man has a right to his ideas.—Most certainly every man who thinks, has a right to his thoughts, while they continue his; but here the question again returns; when does he part with them? When do they become *publici juris*? While they are in his brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are cloathed? Where does this fanciful property begin, or end, or continue? Oh! say they, the ideas are marked in black and white, on paper or parchment——now, then, we get at something; and an action, I allow, will lie for ink and paper: but what says the Common Law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I therefore infer they must be matters of private property, and objects of the Common Law? But granting this general position, we get footing but upon one single step, and new doubts and difficulties arise whenever we attempt to proceed. Is this property descendible, transferrable, or assignable? When published, can the purchaser lend his book to his friend? Can he let it out for hire as the Circulating Libraries do? Can he enter it as common stock in a literary club, as is done in the country? (Every thing of this kind, in a degree, prejudices the author’s sale of the impression.) May he transcribe it for a charity? Then what part of the work is exempt from this desultory claim? Does it lie in the sentiments, the language, and style, or the paper? If in the sentiments, or language, no one can translate or abridge them. Locke’s Essay might perhaps be put into other expressions, or newly methodized, and all the original system and ideas be retained. These questions shew how the argument counter-

counter-acts itself, how the subject of it shifts, and becomes public in one sense, and private in another: and they are all new to the Common Law, which leaves us perfectly in the dark about their solution? And how are the Judges, without a rule or guide, to determine them when they arise, whose books and studies afford no more light upon the subject than the common understandings of the parties themselves? What diversity of judgments! what confusion in opinion must they fall into! without a trace or line of law to direct their determination! What a code of Law yet remains for their ingenuity to furnish, and could they all agree in it, it would not be law at last, but Legislation. But 'tis said that it would be contrary to the ideas of private justice, moral fitness and public convenience, not to adopt this new system. But who has a right to decide these new cases, if there is no other rule to measure by but moral fitness and equitable right? Not the Judges of the Common Law, I am sure. Their business is to tell the suitor how the law stands, nor how it ought to be; otherwise each Judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various, as the minds and tempers of mankind. As it is, we find they do not always agree, but what would it be, where the rule of right would always be the private opinion of the Judge, as to the moral fitness and convenience of the claim? Caprice, self-interest, vanity would by turns hold the scale of justice, and the law of property be indeed most vague and arbitrary. That excellent judge, Lord Chief Justice Lee, used always to ask the counsel, after his argument is over, "Have you any case?" I hope Judges will always copy the example, and never pretend to decide upon a claim of property, without attending to the old black letter of our law, without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced."

With respect to inventors, I can see no real and capital difference between them and authors; their merit is equal, they are equally beneficial to society, or perhaps the inventor of some of those master-pieces of art, which have been mentioned, has there the advantage. All the Judges who have been of a different opinion, conscious of the force of the objection from the similarity of the claim, have told your Lordships they did not know but that an action would lie for the exclusive property in a machine at Common Law, and chose to resort to the patents. It is indeed extraordinary that they should think so, that a right that never was heard of could be supported by an action that never yet was brought. If there be such a right at Common Law, the crown is an usurper; but there is no such right at Common Law, which declares it a monopoly; no such action lies; resort must be had to the crown in all such cases. If then there be no foundation of right for this perpetuity by the positive laws of the land, it will, I believe, find as little claim to encouragement upon public principles of sound policy, or good sense.

"If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals,

those sublime spirits, who share that ray of divinity which we call genius, are intrusted by providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. *Scire tuum nihil est, nisi te scire, hoc sciat alter.* Glory is the reward of science, and those who deserve it, scorn all meaner views; I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much as a sheet of letter-press. When the bookseller offered Milton *sl.* for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labor; he knew that the real price of his work was immortality, and that posterity would pay it.

"Some authors are as careless about profit as others are rapacious of it, and what a situation would the public be in with regard to literature if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintots of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.

"Instead of Salesmen, the Booksellers of late years have forestalled the market, and become engrossers. If therefore the monopoly is sanctified by your Lordships' judgement, exorbitant prices must be the consequence; for every valuable author will be as much monopolized by them as Shakespeare is at present, whose works, which he left carelessly behind him in town, when he retired from it, were surely given to the public if ever author's were; but two prompters or players behind the scenes laid hold of them, and the present proprietors pretend to derive that copy from them, for which the author himself never received a farthing.—

I pass over the flimsy supposition of an implied contract between the bookseller who sells, and the public which buys the printed copy; it is a notion as unmeaning in itself as it is void of a legal foundation. This perpetuity now contended for is as odious and as selfish as any other; it deserves as much reprobation, and will become as intolerable. Knowledge and science are not things to be bound in such cobweb chains; when once the bird is out of the cage—*volat irrevocabile*—Ireland, Scotland, America will afford her shelter, and what then becomes of your action? His Lordship concluded with several observations on the statute of Queen Anne, in which he took notice that the old copies were entitled to twenty-one years, and the new ones but fourteen, and said, that if the legislature had intended to make the right perpetual they would have taken care that the remedy should be so too.

SATURDAY,

S A T U R D A Y, February 26.

The Lord Chancellor, Lord Lyttleton, the Bishop of Carlisle, and Lord Effingham Howard, gave their several opinions.

The Lord CHANCELLOR prefaced what he was about to speak, by declaring, that he had made the decree entirely as of course, in pursuance of the decision upon the right in the Court of King's Bench, and that as what he had decreed, as a Chancellor, was merely a step in the gradation to a final and determinate issue in the House of Peers, he was totally unbiassed upon the question, and therefore could speak to it as fairly from his own sense of it, as any one of the Judges, or any of the Lords present.

He then entered into a very minute discussion of the several citations and precedents that had been relied upon at the Bar, shewed where they failed in application to the present case; and one by one described their complexion, their origin, and their tendency; in each of which he proved that they were foreign to any constructions which could support the Respondents in their argument; he was no less precise and full in exposing the absurdity of the authorities derived from the Stationers Company; quoting several extraordinary entries to be met with in their books; among others, he said, that one Sibthorpe had entered a book there, "the title of which," says the entry, "is to be sent hereafter; and another member entered the name of a book "*about* to be translated by him;" by which all the rest of the world were to be restrained, in the mean time, perhaps for ever, from translating the same. He then very fully stated the several cases of injunctions in the Court of Chancery, produced several original letters from Swift to Faulkner and others, relative to the statute of Queen Anne, and gave an historical detail of all the proceedings in both Houses upon the several stages of that act, and the alterations it had undergone in the preamble and enacting clauses, all tending to shew the sense of the legislature, at the time of passing it, to be against the right; and that they rejected the other bills afterwards, drawn up chiefly by the advice of Dean Swift, and the countenance of Mr. Addison, which were presented in the same spirit, and upon the same grounds; and concluded with declaring that he was clearly of opinion with the Appellants.

Lord Lyttleton owned that he had no great acquaintance with the quirks and quibbles of the law. He spoke to the matter merely as a question of equity; he would not enter into a delusive, refined, metaphysical argument about tangibility, the materiality, or the corporeal substance of Literary Property; it was sufficient for him, that it was allowed such a property did exist. Authors, he presumed, would not be denied a free participation of the common rights of mankind, and their property was surely as sacred, and as deserving of protection, as that of any other subjects. It was of infinite importance to every country, that the arts and sciences should be cultivated and encouraged; where men of letters were best protected, the people in general would be most enlightened, and where
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the minds of men were enlarged, where their understandings were equally matured in perception and in judgment, there the arts and sciences would take their residence. The arts and sciences had their origin in Italy; from thence they fled to a remote corner of Asia; at length they returned companions of the all-conquering arms of the Roman Republic; and at last they were happily seated in this free country. In his Lordship's opinion, at present there were but two monarchs in Europe, who were the encouragers of the arts and sciences, and were themselves men of letters, the King of Prussia, and the King of England. It had been urged, that authors wrote for fame only; that glory was their best reward, and that immortality of renown was an ample recompence for their labours; they therefore did not stoop to claim a further right than that of a first communication of their ideas to the public. This, his Lordship observed, was in a confined sense, a proper and a noble observation, but it would not hold generally. He begged their Lordships to remember, that genius was peculiar to no clime, it belonged to no country, it was more frequently found in the cottage than the palace; it rather crawled on the face of the earth than soared aloft; when it did mount, its flight should not be impeded. To damp the wing of genius was, in his mind, highly impolitic, highly reprehensible, nay, somewhat criminal. If authors were allowed a perpetuity, it was a lasting encouragement; making the right of multiplying copies a matter common to all, was like extending the course of a river so greatly, as finally to dry up its sources. After several poetical sentiments, his Lordship concluded with giving his opinion that the decree should be affirmed.

The Bishop of CARLISLE then spoke as follows.

" My Lords,

" As the proceedings in this important cause have been carried to so great a length, I should not have presumed to trouble your Lordships with any thoughts of mine upon the subject, did I not entertain hopes of shortening your Lordships farther trouble, by endeavouring to draw your attention from the many foreign topics that have been mixed with the present question: such for instance as the following—In which of the various classes of right or property, is this contested one to be ranked—Whether it is a property properly so called, or only a right to some property:—Whether such property be a corporeal one, or incorporeal—What is the subject in which it inheres—Whether it lies in the letters of a book, or the ideas, or in both—Whether it be a perfect, an imperfect, or only a *quasi* right—Whether it is real, or personal, original or derived—Whence it might derive its origin, and what is its extent and duration—How far it is deducible from ancient practice, or grounded on the authority of precedents—How it has stood in different countries—or in our own at different periods—before or after the art of printing—and the like.

" Speculations of this kind, however useful on some occasions, and always entertaining, yet I cannot help esteeming them in a great measure foreign to the main point, and am therefore desirous of having all such waved, and your Lordships deliberation reduced to the present state of that right under the direction of our legislature, which has made, or at least attempted to make, certain express
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regulations in it; more particularly that act in the 8th of Q. Anne, which has been so much tortured and perplexed in arguments offered at your Lordship's bar; but a fair stating and unforc'd construction of it, I apprehend to be sufficient for deciding the whole controversy. The title of the act runs, for the encouragement of learning, and some clauses in it evidently tend that way, while others have been understood in such a manner, as must rather occasion its discouragement, and made to signify either nothing at all, (which is surely one of the greatest absurdities in the interpretation of any law) or to imply something repugnant to its avowed intent, by putting affairs into a worse condition than they were in before the commencement of this favourable act; nay worse than others are who decline the acceptance of its benefits, while attended with all those clogs and limitations, which are too well known to need a particular detail. The method there adopted for this encouragement of learning, was, we find, very maturely digested in several conferences between the two Houses, and at last declared to be (not by securing any original Copy Right, as was proposed by those booksellers who promoted the bill; but) by vesting copies of printed books in the authors or purchasers of such copies, during the time therein mentioned, and no longer.—How far this deliberate alteration of the phrase may be deemed a material one, and whether insisting on the two distinct significations of these terms, vesting and securing, as here circumstanced, though they may be elsewhere used promiscuously; Whether the taking notice of that remarkable attention in our law makers to the wording of this act may not amount to something more than a trifling verbal criticism: whether this vesting of a right in authors is merely additional and accumulative, or does not imply a creative influence *de novo*, an actual constitution of such a plenary right, as had only an ideal pre-existence without it;—these points must be submitted to your Lordships.

“ I shall here only take the liberty to repeat what has been observed on a subsequent statute of the 10th of Queen Anne, concerning stamp duties laid on pamphlets, which by expressly referring to this before us, and explaining the nature both of that copy right which springs from it, and of those others that may be drawn from different sources, seems to put the intention of both these acts out question. The penalty of a default here is extended to the annihilation of all copy-rights whatsoever, in these words: “ Then the author, printer, and publisher, of such pamphlet shall lose all property therein, and in every copy thereof, although the title thereto were registered in the book of the Stationers in London, according to the late Act of Parliament in that behalf, so as any person may freely print and publish the same, without being liable to any action or prosecution for so doing; *any thing in the said Act of Parliament for vesting copies of printed books in the authors; or in any bye law contained; or an custom, or other thing to the contrary notwithstanding.*” I must leave it to your Lordships consideration whether that Common Law right, if it arises either from *custom* or *any other thing*, be not here manifestly included.

“ To return to the former statute. After the creation then, or establishment of such an exclusive right as is conferred upon authors in the body of this act, there comes a *proviso*, that *nothing in the said act shall be construed to extend, either to prejudice or confirm any right that the universities or any persons have or claim to have*—i. e. (according to the most natural construction of these words) any persons

sons holding *in or under* the said universities, or claiming any privilege of the same kind, and on the same ground with that of the universities, *i. e.* some *positive* one given or granted by special licence or letters patent, by statute or charter, as their's evidently is; and all others under the consideration of these law-makers are understood to be:—whereas *if this proviso* were taken in so lax and indeterminate a sense as to include *ANY* other persons, setting up any claim on *other* grounds, it will admit *every body*; and consequently its restrictive clauses are reduced to a mere nullity.

“Neither is that observation drawn from the *preamble* of this act to be wholly admitted, nay that the apparently soft terms applied to those several persons who had *of late taken the liberty to print books without the consent of their respective authors*—that these gentle terms (so unusual in penal statutes) would scarcely have been used on this occasion if such a practice as was then and there laid under certain restraints, were designed to be branded as antecedently, or absolutely criminal. But if so great advantage is taken from a general mention in the proviso, of *persons and rights*, not there sufficiently described, as to afford room for maintaining the forementioned absurdity; if the said act proves to be so inaccurate and defective, (as in truth it is extremely defective, with regard to the penalties annexed; the time of suing for them, the method of securing their copies to the universities, and other particulars too notorious to need enlarging upon in this [L. cc]) I beg leave to suggest an enquiry to your Lordships, (tho' the matter does not immediately fall under your present consideration) whether it be not high time to have this faulty act amended:—let it be revised as soon as possible rather than suffered to be under so many imperfections as can serve only to ensnare numbers who are acting on the most obvious sense, and supposed validity of it, to their ruin; and either mislead others in the interpretation of some essential parts of it; or make the whole useless, and a dead letter.—

“However, so long as this same act does keep its ground, it must be considered as standing on principles directly opposite to the notion of any abstract independent perpetual Copy-right; which right, whatever it were supposed to be originally, is now plainly circumscribed and subjected to certain restrictions; provided always that the said act be really capable of affecting it in any respect, which some persons seem to doubt of, and others, (if I mistake not) have gone so far as to deny:—and if it once comes to be an established maxim, that acts of parliament can have no effect on claims subsisting at Common Law; in vain surely does the legislature employ itself in framing any concerning them.—But as this is not yet clearly admitted to be the case, even with the act before us, which is allowed to be in force, whatever that force may be—so long as ever it exists, it must exclude all that Right paramount and inextinguishable, which is exhibited along with it; which being dressed up at pleasure, has made its appearance under so many questionable shapes, and been so warmly espoused under each of them; but yet after all the pains taken with it, is still, I humbly conceive, of too delusory and unsubstantial a nature to be laid hold of by common apprehensions—too vague and intricate to be perfectly and unanimously ascertained even by the most learned sages of the law; and too feeble to be safely relied on, either for promoting the general service of the public, or for supporting any true, valuable interests of Literature in particular.”

Lord

Lord Effingham Howard spoke to the question merely as likely to affect the Liberty of the Press. He thought that the confining the right of multiplying copies to the author and his assigns, might prove dangerous to the constitutional rights of the people, and he justified this idea by declaring that the press was the sole controul of the actions of Princes and Ministers; that if a despotic measure was adopted by either, the freedom of the press would be properly and efficaciously exerted in informing the people and rousing a spirit of resistance. He finally instanced that ground of his argument by supposing that upon the occurrence of some very unconstitutional and despotic measure, a pamphlet properly describing the matter was published, and that the minister bought up the impression and copyright, thereby choaking the channel of public information, and securing in his closet the secret which might prevent the loss of freedom to the subject. His Lordship concluded with declaring that he was satisfied in himself, that the Liberty of the Press was of such infinite consequence in this country, that if the constitution was over-turned, and the people were enslaved, grant him but a free press and he would undertake to restore the one and redeem the other. His Lordship therefore was for reversing the decree.

The Decree of the Court of Chancery was accordingly reversed; and the Defendants have since presented a petition to the House of Commons, praying relief, which is now under the consideration of a Committee.

F I N I S.

